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Supreme Court of the United States

October Term, 1968

No. 263

RALPH ILOWITE,

Petitioner,

against

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Victor Rabinowitz,
Leonard B. Boudin,
Michael B. Standard,
30 East 42nd Street,
New York, New York 10017.
Attorneys for Petitioner.

David Rosenberg
of Counsel.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered herein on March 5, 1968, affirming an order of the Federal Communications Commission.

Opinion Below

The opinion of the Court of Appeals, as yet unreported, is appended hereto, *infra*, at pp. 25-26.

Jurisdiction

The judgment of the Court of Appeals was made and entered on March 6, 1968, and is appended hereto, *infra*, at p. 27. On May 24, 1968, Mr. Justice Brennan extended petitioner's time for filing a petition for a writ of certiorari to July 3, 1968;

the order is appended hereto at p.24. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does the Communications Act of 1934 (hereinafter the Act) authorize the Federal Communications Commission (hereinafter the Commission) to require that an applicant for an Amateur Operator and Station License and a Class D Citizen's Radio Service License fill out a questionnaire, under oath, relating to his political associations and beliefs?

2. If the Act authorizes the questionnaire, does the Act abridge the petitioner's First Amendment rights of speech, belief and association and deprive the petitioner of his right to due process of law under the Fifth Amendment to the Constitution?

3. Was the questionnaire, which required the petitioner to make unlimited disclosures of his political affiliations and beliefs, void on its face for overbreadth?

4. Was the denial of the petitioner's application by the Commission on the sole ground that the petitioner refused to fill out the questionnaire in reliance on his First Amendment rights an impermissible penalty for the good faith assertion of constitutional right?

5. Did the Commission violate petitioner's Fifth Amendment privilege against self-incrimination in requiring him to answer, under oath, questions as to his membership in the Communist Party or in any organization which advocates the overthrow of Government by force and violence?

Constitutional, Statutory and Regulatory Provisions Involved

See *infra*, pp. 18-23.

Statement of the Case

In September, 1966, petitioner filed with the Commission an application for the renewal of his Amateur Operator and Station License* and for the granting of a Class D Citizen's Radio License.** On October 13, 1966, the Commission sent petitioner a letter, directing that as a condition to the further processing of his applications, he answer, under oath, the following questionnaire:

> "1. Are you now or have you ever been a member of the Communist Party? If the answer is yes, give dates of membership.
>
> 2. Are you now or have you ever been a member of any organization or group which advocates or teaches the overthrow of the Government of the United States or of any political subdivision thereof, by force or violence? If the answer is yes, list the organization or group and give the dates of membership.
>
> 3. If the applicant's answer to either or both of the above questions is yes, he may submit as an attachment a statement explaining the circumstances of joining, membership and reason or reasons for leaving membership if such is the case."

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* This license is described by the Commission's regulations in 47 CFR 97.1 *et seq.*

** This license is described by the Commission's regulations in 47 CFR 95.1 *et seq.*

The Commission made no charges of any sort as to what conduct or qualifications of the petitioner were at issue.

Petitioner, by counsel, informed the Commission in a letter dated November 9, 1966, that he declined to answer the questionnaire on the ground that the Commission did not have the legal authority to require such answers as a condition to the issuance of the licenses he seeks. Furthermore, petitioner objected to the questionnaire as an interference with his constitutional rights.

The Commission, responding on November 28, 1966, referred to Sections 303(l), 308(b) and 309(a) of the Communications Act of 1934 as authority for the submission of the questionnaire and to the decisions of the Court of Appeals for the District of Columbia in *Borrow* v. *Federal Communications Commission*, 285 F. 2d 666, *cert. denied* 364 U.S. 892; *Cronan* v. *Federal Communications Commission*, 285 F. 2d 288, *cert. denied* 366 U.S. 904 and *Blumenthal* v. *Federal Communications Commission*, 318 F. 2d 276. Again, the petitioner was requested to execute the questionnaire with the warning that if he did not his application would be dismissed.

Upon the petitioner's failure to fill out the questionnaire and for no other reason, the Commission dismissed the petitioner's application without prejudice, by order dated February 9, 1967 appended hereto at p. 28.

A petition for review of this order was filed in the United States Court of Appeals for the Third Circuit pursuant to 5 U.S.C. §§ 1031-1034 and 47 U.S.C. § 402(a). The court in a *per curiam* opinion and judgment filed on March 5, 1968, affirmed the order of the Commission, with Judge Seitz dissenting,

Judge Freedman concurring, found the dissent of Judge Washington in the *Borrow* case, *supra*, "a powerful one", but felt that "until the Supreme Court indicates that the majority opinion in that case which has since been followed consistently in the District of Columbia Circuit is erroneous, I believe that our Circuit should follow it."

Reasons Relied on for the Allowance of the Writ

1. The decision of the court below, finding that the Commission was authorized under Section 301(l), 308(b) and 309(a) of the Communications Act of 1934* to interrogate radio license applicants with respect to their political associations and beliefs, is in direct conflict with this Court's decision in *Schneider* v. *Smith*, 390 U.S. 17.

The *Schneider* case reaffirmed the rule earlier pronounced in *Kent* v. *Dulles*, 357 U.S. 116; *Greene* v. *McElroy*, 360 U.S. 474; and *United States* v. *Rumely*, 345 U.S. 41 "that statutory words are to be read narrowly so as to avoid questions concerning the 'associational freedom' that *Shelton* v. *Tucker* [364 U.S. 479] protected and concerning other rights within the purview of the First Amendment." *Schneider* v. *Smith*, *supra*, at 27. Such "questions" are raised in this case by the Commission's assertion of authority to inquire as to the political affiliation and beliefs of an applicant for a license. See *Shelton* v. *Tucker*, *supra*; *Talley* v. *California*, 362 U.S. 60; *United States* v. *Rumely*, *supra*; *Speiser* v. *Randall*, 357 U.S. 513; *Gibson* v. *Florida Legislative Investigation Committee*, 371 U.S. 539; *DeGregory* v. *New Hampshire Attorney General*, 383 U.S. 825; *Spevack* v. *Klein*, 385 U.S. 511; see also *infra* at p. 15.

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* 47 U.S.C. Secs. 303(l), (m)(1), 308(b), 309(a).

Specifically, *Schneider* concerned political questions of precisely the kind involved in this case, promulgated by the Commandant of the Coast Guard to an applicant for a merchant marine license. Authority for inquiry in *Schneider* was claimed under the Magnuson Act, §191(b), which empowered the President to

> "Institute such measures and issue such rules and regulations –
>
> * * *
>
> (b) to safeguard against destruction, loss, or injury, from sabotage or other subversive acts, accidents, or other causes of similar nature . . ."

This Court unanimously (Mr. Justice Marshall not participating) rejected this claim of authority, ruling that when the delegation of power contained in §191(b) is read

> "with an eye to First Amendment problems, we hesitate to conclude that Congress told the Executive to ferret out the ideological strays in the maritime industry. The words it used–'to safeguard . . . from sabotage or other subversive acts'–refer to actions, not to ideas or beliefs. We would have to stretch those words beyond their normal meaning to give them the meaning the Solicitor General urges." *Id.* at 26-27.

The court below, in this case, inferred statutory authority for the Commission's political interrogatories from language far less specific than that found wanting in *Schneider*–language which Mr. Justice Fortas, in his concurrence, termed "dubious general language". 390 U.S. at 27. Reading the pertinent sections of the Communications Act "with an eye to First Amend-

ment problems" and with the required narrow focus, it is impossible to find authority for the unlimited and indiscriminate inquiry undertaken by the Commission. The Commission is given power to prescribe "as public convenience, interest or necessity requires . . . qualifications of station operators" and to grant applications for station licenses upon a finding that the "public convenience, interest and necessity would be served" [§309(a)]. These provisions are routine in a regulatory statute. The Commission is further given authority to prescribe "regulation[s] . . . as to [what facts shall be set forth on applications for station licenses with respect to] the citizenship, character, and financial, technical and other qualifications of the applicant to operate the station" [§308(b)]. The language in the statute does not permit the Commission to establish a loyalty test for applicants or to conduct an inquiry into their political beliefs and associations and, indeed, the Commission has never prescribed loyalty qualifications in any of its regulations.* Unlike the Magnuson Act provisions considered in *Schneider*, the Communications Act does not even contain language authorizing the Commission to protect against "sabotage or other subversive acts". See the dissenting opinion of Judge Washington in *Borrow* v. *Federal Communications Commission*, 285 F. 2d 666, 667 (D.C. Cir. 1960); see also *infra* at p. 9.

Again, the authority claimed by the Commission is based on statutory language no more precise and explicit than the language unsuccessfully relied upon by the Secretary of State in *Kent* v. *Dulles*, 357 U.S. 116. This Court there found the statutory authorization of the President and Secretary of State

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*The only "citizenship, character and financial, technical and other qualifications" set forth in the regulations are those appearing in 47 CFR Secs. 95.7, 95.13, 97.9, 97.11 and 97.13. See *infra* at pp. 20-23.

to prescribe rules for the issuance of passports (22 U.S.C. §211a) and the statutory prohibition against departure from the United States without a valid passport (8 U.S.C. §1185) insufficient support for the claimed authority to conduct an investigation into the political beliefs and associations of passport applicants. See *Kent* v. *Dulles*, *supra* at 129.

Faced with the assertion of similarly "generalized provisions" as those considered in *Kent*, for the basis of authority claimed by the Secretary of Defense to promulgate loyalty tests for employees of manufacturers who produced goods for the Armed Services, this Court in *Greene* v. *McElroy*, *supra* at 507, held that no such authority was intended by Congress since

> "it must be made clear that the President or Congress, within their respective constitutional powers specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. *Cf. Watkins* v. *United States*, 354 U.S. 178; *Scull* v. *Virginia*, 359 U.S. 116; *Peters* v. *Hobby*, 349 U.S. 331; *Ex parte Endo*, 323 U.S. 283, 301-302. They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, see *Peters* v. *Hobby*, *supra*, but also because explicit action, especially in areas of doubtful constitutionality, require careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them."

In this case there is not only an absence of an express statutory delegation, but there is strong evidence that Congress has refused to give the Commission the authority it claims to possess. In 1940 and in 1941 bills were introduced in the House of Representatives* empowering the Commission to refuse radio licenses to "subversives". "All, including Bland [H.R. 5074], were based on the assumption that the Commission lacked the requested authority." *Borrow* v. *Federal Communications Commission, supra,* dissenting opinion of Judge Washington at p. 671.** None of these bills were enacted by Congress. Indeed, in a memorandum submitted in connection with hearings conducted by the Senate Committee on Commerce on the Bland Bill, the Commission expressly objected to the provision authorizing it to investigate "subversives" on the grounds that it had no experience in the area and was unprepared to undertake the responsibility. *Hearings in Senate Committee on Commerce, supra,* at pp. 77-79.

It will be noted that Congress has chosen to use express language when authorizing the screening of "subversives" in this area. Such an authorization was given to the Navy with regard to radio operators in the Merchant Marine (Pub. L. 351, 77th Cong., 1941). But the Navy authorization, which terminated at the end of wartime hostilities, raises no inference as to the Commission's present power in this area since wartime measures do not bear on normal problems of statutory construction. *Kent* v. *Dulles, supra,* at 128.

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*Congressman Izac sponsored H.R. 10446, 76th Cong., 3d Sess. (1940) and H.R. 3364, 77th Cong., 1st Sess. (1941). Congressman Dirksen sponsored H.R. 2662, 77th Cong., 1st Sess. Secs. 107, 108 (1941). Congressman Bland sponsored H.R. 5074, 77th Cong., 1st Sess. (1941).

**See *Hearings in House Committee on Merchant Marine & Fisheries on H.R. 2662,* 77th Cong., 1st Sess., Feb. 26, 1941, p. 10ff; *Hearings in Senate Committee on Commerce on H.R. 5074,* 77th Cong., 1st Sess., pp. 71, 75, 77-79, 80. Judge Washington's observation is further supported by the House floor debate on the Bland bill, 87th Cong. Rec. 6259, 77th Cong., 1st Sess. (July 22, 1941).

Relying on this legislative history and debate, Judge Washington concluded "that the Commission lacks the authority which it now asserts". *Borrow* v. *Federal Communications Commission, supra,* at 671.

2. If authorized by statute, we submit that the Commission's inquiry into political associations and beliefs abridged the petitioner's First Amendment rights. Both the Congress in its statutory delegation, and the Commission in its regulatory implementation of its delegated powers failed to meet the standard of "precision" enjoined upon them by the Constitution. As this Court has said so many times:

> "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button,* 371 U.S. 415, 438.

See also *Aptheker* v. *Secretary of State,* 378 U.S. 500, 512, 513; *United States* v. *Robel,* 389 U.S. 258, 265.

The reasons for a strict rule of precision were concisely stated by the Court in *Keyishian* v. *Board of Regents,* 385 U.S. 589, 604:

> "'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' *Id.*, at 432-433. . . When one must guess what conduct or utterances will lose him his position, one necessarily will 'steer far wider of the unlawful zone . . .' *Speiser* v. *Randall,* 357 U.S. 513, 526. For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions'."

(a) The statutory delegation—§§ 301(l), 308(b) and 309(a) of the Communications Act of 1934—does not establish any standards at all to govern the Commission's determination as to

who shall be barred from obtaining a radio license on grounds that issuance would pose a threat to the security of radio operations in this country. The absence of standards violates even the lenient rules governing statutory delegation of power in non-First Amendment situations, *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, and is constitutionally intolerable certainly in an area directly affecting the fundamental rights guaranteed by the First Amendment. *NAACP* v. *Button, supra,* at 432; *Lovell* v. *Griffin,* 303 U.S. 444; *Cantwell* v. *Connecticut,* 310 U.S. 296; *Saia* v. *New York,* 334 U.S. 558; *Greene* v. *McElroy, supra.*

As noted above, the absence of statutory standards is not in any respect sought to be remedied by the adoption of regulatory standards by the Commission itself. The regulations establishing qualifications for a Class D Citizen Radio Service license provide merely that a licensee must be a citizen of the United States and at least 18 years of age. 47 CFR, §§ 95.7 and 95.13. The regulations establishing qualifications for an amateur radio license provide that the applicant be a citizen or national of the United States and that he be able to pass a technical examination. 47 CFR, §§ 97.9, 97.11 and 97.13. Thus, not even Commission regulations authorize the issuance of questionnaires to applicants for licenses in the manner followed in this case.

The statutory and regulatory scheme in this case thus has the same "quality of 'extraordinary ambiguity'" condemned in *Keyishian* v. *Board of Regents, supra.* There, impermissible vagueness was not only apparent on the face of the statutes and regulations involved, but was also "aggravated by prolixity and profusion of statutes, regulations and administrative machinery, and by manifold cross-references to interrelated enactments and rules". *Id.* at 604.

If the complex statutes and regulations in *Keyishian* offer no guide to conduct, what can be said of a situation where there are no statutory provisions at all and no regulatory machinery and where the Commission's operations in this area are concededly *ad hoc*? 23 Pike & Fischer, R.R. 1627, 1628, cited by the respondents in their brief in the court below at p. 19.

(b) In *Keyishian*, at p. 609, the Court found that under the New York scheme the fact of membership in the Communist Party alone gave rise to a presumption of disqualification. This presumption was held void for "overbreadth", *id.* at 609, in that it proscribed "mere knowing membership without any showing of specific intent to further the unlawful aims of the Communist Party". *Id.* at 609-610. The vice of "overbreadth" inheres in the present case. Obviously the Commission does not ask questions merely out of curiosity; in demanding an explanation of Communist Party membership, the Commission has created a *prima facie* disqualification arising from such membership. See *Travis Lafferty*, 23 F.C.C. 761, 765-766 (1957). Clearly such a presumption also violates the constitutional prohibition against *ex post facto* laws and bills of attainder. *Cummings* v. *Missouri*, 4 Wall. (71 U.S.) 277; *Ex parte Garland*, 4 Wall. (71 U.S.) 333; *United States* v. *Lovett*, 328 U.S. 303; *United States* v. *Brown*, 381 U.S. 437.

Furthermore, the use of constitutionally protected membership as the triggering device for an extended and indiscriminate investigation into the applicant's political past, for a demand for unlimited disclosure of activities and associations with respect to that membership and for an indefinite delay in the issuance of the license sought creates an undue burden on the protected membership. *Cf. Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 246. The "chilling effect" of such a burden is apparent, *Keyishian* v. *Board of Regents*, *supra*, at 607, as even "[t]he

threat of sanctions may deter. . .almost as potently as the actual applications of sanctions". *NAACP* v. *Button, supra,* at 433. See also *Keyishian* v. *Board of Regents, supra,* at 604, 607, n. 11.

Borrow v. *Federal Communications Commission, supra,* is wholly relied upon by the *per curiam* opinion of the court below and by Judge Freedman in his concurrence. We believe that the dissenting opinion by Judge Washington in that case is the better law, but in any event the majority opinion has been superseded by constitutional doctrine developed in the eight years since that decision. It is apparent from the *Borrow* opinion at pp. 668-669 that the court's approval of the political inquiry conducted by the Commission was based on its erroneous belief that the Commission could legally refuse to license "those who belong to organizations advocating or teaching the overthrow of this government by force or violence". But see *Aptheker* v. *Secretary of State, supra; United States* v. *Robel, supra.*

(c) The Commission places the onus of proving loyalty on the applicant. Unlike citizenship and other technical qualifications with respect to which the applicant has the burden of proof, loyalty relates to freedom of speech and association guaranteed by the First Amendment. In *Speiser* v. *Randall, supra,* at p. 526, this Court held that the burden of proving loyalty could not constitutionally be imposed on a person seeking a state tax exemption.

The result of permitting such a burden to be placed on the applicant, as exemplified by this case, is to compel the applicant to submit, on pain of loss of the governme nt license he seeks, to an unlimited procedure of oath-taking and information disclosure. The statutes and regulations do not prescribe the scope of the loyalty investigation, nor did the Commission in-

form the petitioner of the relevance of its questions. Such an open-ended investigation, netting far more information than is necessary or relevant is condemned by the Constitution and, as in *Speiser*, the applicant here is "not obliged to take the first step in such a procedure", *id.* at 529.

Furthermore, there has been no showing by the Commission that the petitioner's loyalty has been questioned, or that there is any other reason for its inquiry. Concededly the Commission does not put this question to all applicants and "an adequate foundation for inquiry" in petitioner's case has not been established. *Gibson* v. *Florida Legislative Investigation Committee, supra,* at 557. In the context of the Commission's exercise of a judicial function in determining whether to grant the petitioner a radio license, the requirement that it establish "an adequate foundation for inquiry" has all the aspects of the right to confrontation and notice of changes required by due process of law. See *Schneider* v. *Smith, supra,* at 25. *Cf. Willner* v. *Committee on Character and Fitness,* 373 U.S. 96; *Morgan* v. *United States,* 304 U.S. 1; *Greene* v. *McElroy, supra.* It is especially important to note that in refusing to renew petitioner's amateur license, the Commission's action amounted to revocation. It is well established that in revoking licenses government agencies must adhere to strict requirements of procedural due process. *In re Ruffalo,* ___ U.S. ___, 36 U.S.L.W. 4284.

Certainly the rule should be no less strict in the adjudicatory proceeding involved in this case than in the legislative investigation involved in *DeGregory* v. *New Hampshire Attorney General,* 383 U.S. 825, 830, where the Court held that a disclosure of an individual's political association could not be compelled without the prior establishment of a "'nexus' between appellant and subversive activities in New Hampshire". *Cf.*

Marcus v. *Search Warrants of Property*, 367 U.S. 717; *A Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205.

(d) The two political affiliation interrogatories submitted to the petitioner by the Commission are void on their face. Both suffer from the overbreadth condemned in closely analogous cases, *Shelton* v. *Tucker*, 364 U.S. 479, 488-490; *Talley* v. *California*, 362 U.S. 60, 64; *Schneider* v. *Smith*, *supra*, at 24, and Mr. Justice Black's and Mr. Justice Fortas' concurring opinions at p. 27; *DeGregory* v. *New Hampshire Attorney General*, *supra*, at 829. *Cf. Schneider* v. *State*, 308 U.S. 147, 161.

(e) Petitioner's application was dismissed on the grounds that he refused to answer the Commission's political affiliation interrogatories. This refusal, the respondent argued below, "prevented the Commission from making the affirmative finding required by the Act that a grant of petitioner's application would be in the public interest". (Respondent's brief in the Court of Appeals, p. 17).

But in so dismissing the application the Commission improperly drew an automatic, derogatory inference from the petitioner's good faith assertion of his First Amendment privilege. See *Watkins* v. *United States*, 354 U.S. 178, 197; *DeGregory* v. *New Hampshire Attorney General*, *supra*, at 829.

In *Konigsberg* v. *State Bar*, 353 U.S. 252, 270, this Court stated with respect to the bar applicant's refusal to answer similar political affiliation questions:

> "Obviously the State could not draw unfavorable inferences as to his truthfulness, candor or his moral character in general if his refusal to answer was based on a belief that the United States Constitution prohibited the type of inquiries which the Committee was making."

The Commission has imposed a penalty on the petitioner's exercise of his First Amendment rights which, in an analogous case, *Spevack* v. *Klein*, 385 U.S. 511, has been condemned. See also *Slochower* v. *Board of Higher Education*, 350 U.S. 551, 557.

(f) The procedure followed by the Commission and the decision of the court below also conflicts directly with this Court's rulings in *Spevack* v. *Klein*, 385 U.S. 511; *Uniformed Sanitation Men Association* v. *Commissioner of Sanitation of the City of New York*, ___ U.S. ___, 36 U.S.L.W. 4534, and *Gardner* v. *Broderick*, ___ U.S. ___, 36 U.S.L.W. 4536. In *Spevack*, this Court invalidated an attorney's disbarment based solely on his refusal to answer questions under oath in reliance on his Fifth Amendment privilege against self-incrimination. The denial of a license in this case is no less a penalty for assertion of the privilege than was disbarment in *Spevack*. Even if petitioner had been an employee of the government, the procedure of the Commission would have been improper under this Court's decisions at its last term. Petitioner may not be subjected to "a diminution, however limited, of his Fifth Amendment" or other rights to procedural due process. *Spevack* v. *Klein, supra*, at 520 (Mr. Justice Fortas concurring); *cf. Willner* v. *Committee on Character and Fitness, supra; United States* v. *Robel, supra*, at 263.*

Blumenthal v. *Federal Communications Commission*, 318 F. 2d 276 (D.C. Cir. 1963) upon which the court below relied has therefore also been undermined by the *Spevack* decision.

CONCLUSION

The court below ruled against petitioner although it would seem from a reading of the opinions that two of the three judges thought that the respondent had acted improperly. Only the eight year practice in the District of Columbia Circuit, plus the absence of action by this Court, motivated Judge Freedman to concur in the "majority" holding. We respectfully submit that it is time that this Court grant the writ prayed for, so that the long continued practice of the Federal Communications Commission and the decisions of the District of Columbia Circuit can be reviewed.

Respectfully submitted,

Victor Rabinowitz
Leonard B. Boudin
Michael B. Standard

30 East 42nd Street
New York, N.Y. 10017
Attorneys for Petitioner

David Rosenberg,
of Counsel

July 3, 1968

Statutes and Regulations Involved

Communications Act of 1934

"§ 303. Powers and Duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * *

(l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens or nationals of the United States as the Commission finds qualified, except that in issuing licenses for the operation of radio stations on aircraft the Commission may, if it finds that the public interest will be served thereby, waive the requirement of citizenship in the case of persons holding United States pilot certificates or in the case of persons holding foreign aircraft pilot certificates which are valid in the United States on the basis of reciprocal agreements entered into with foreign governments;

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has wilfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has wilfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him, and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted

under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension."

"§308 . . .

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee."

"§ 309 . . .

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience,

and necessity would be served by the granting thereof, it shall grant such application.

Commission Regulations (47 CFR)

"§ 0.332 . . .

The Chief of the Safety and Special Radio Services Bureau is delegated authority to act upon the following applications, requests and other matter:

* * *

(h) To dismiss applications without prejudice in cases where, prior to designation of such application for hearing, an applicant has failed to answer official correspondence or a request for additional information from the Commission."

"§ 1.961 . . .

(b) Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. Such dismissal will be without prejudice where an application has not yet been designated for hearing; such dismissal may be with prejudice after an application has been designated for hearing."

"§ 95.3. Definitions.

For the purpose of this part, the following definitions shall be applicable. For other definitions, refer to Part 2 of this chapter.

(a) Definitions of services.

* * *

Citizens Radio Service. A radiocommunications service of fixed, land, and mobile stations intended for short-distance personal or business radiocommunications, radio signalling, and control of remote objects or devices by radio; all to the extent that these uses are not specifically prohibited in this part.

* * *

Class D station. A station in the Citizens Radio Service licensed to be operated on an authorized frequency in the 26.96-27.23 Mc/s band or on the frequency 27.225 Mc/s, with input power of 5 watts or less, and for radiotelephony only."

"95.7 General citizenship restrictions.

A station license may not be granted to or held by:

(a) Any alien or the representative of any alien;

(b) Any foreign government or the representative thereof;

(c) Any corporation organized under the laws of any foreign government;

(d) Any corporation of which any officer or director is an alien;

(e) Any corporation of which more than one-fifth of the capital stock is owned of record or voted by: Aliens or their representatives; a foreign government or representative thereof; or any corporation organized under the laws of a foreign country;

(f) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, if the Commission finds that the public interest will be served by the refusal or revocation of such license; or

(g) Any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by: Aliens or their representatives; a foreign government or representatives thereof; or any corporation organized under the laws of a foreign government, if the Commission finds that the public interest will be served by the refusal or revocation of such license."

"§ 95.13. Eligibility for station license.

(a) Subject to the general restrictions of § 95.7, any person, other than an unincorporated association in the case of a Class D station, is eligible to hold an authorization to operate a station in the Citizens Radio Service: *Provided*, That if an applicant for a Class A, Class B or Class D station authorization is an individual or partnership, such individual or each partner is eighteen or more years of age; or if an applicant for a Class C station authorization is an individual or partnership, such individual or each partner is twelve or more years of age.

"§ 97.13. Renewal or modification of operator license.

(a) An amateur operator license, except the Novice Class, may be renewed upon proper application in which it is stated that the applicant has lawfully accumulated, at an amateur station licensed by the Commission, a minimum total of either 2 hours operating time during the last 3 months or 5 hours operating time during the last 12 months of the license term. Such operating time, for the purpose of renewal, shall be counted as the total of all that time between the entries in the station log showing the beginning and end of transmissions as required in § 97.103(a), both during single transmissions and during a sequence of transmissions. The application shall, in addition to the foregoing, include a statement that the applicant can send by hand key, i.e., straight key or any other type of hand operated key such as a semi-automatic or electronic key, and receive by ear, in plain language, messages in the International Morse Code at a speed of not less than that which is required in qualifying for an original license of the class being renewed."

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. , *October Term, 1967*

RALPH ILOWITE,

Petitioner,

vs.

UNITED STATES, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 3, 1968.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 24 day of May, 1968.

Opinion of the
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16527

RALPH ILOWITE,
Petitioner,

v.

UNITED STATES OF AMERICA AND THE
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Argued January 8, 1968

Before McLAUGHLIN, FREEDMAN and SEITZ, *Circuit Judges*

OPINION OF THE COURT

(Filed March 5, 1968)

PER CURIAM.

The Federal Communications Commission dismissed without prejudice petitioner's applications for amateur and citizen's radio licenses because he refused to answer the Commission's inquiry as to whether he was or had ever been a member of the Communist Party or of any organization or group which advocates or teaches the overthrow of the Government of the United States, or of any political subdivision thereof, by force or violence. The questions were based on Sections 301(1), 308(b) and 309(a) of the Communications

Act of 1934, as amended (47 U.S.C. §§ 303(1), 308(b), 309(a)). See also Section 1.961(b) of the Commission's Rules, 47 C.F.R. 1.961(b). The Commission's questions were entirely proper. Borrow v. F.C.C., 285 F.2d 666 (D.C. Ct. App. 1960), cert. den. 364 U.S. 892 (1960); Bronan v. F.C.C., 285 F.2d 288 (D.C. Ct. App. 1960), cert. den. 366 U.S. 904 (1961); Blumenthal v. F.C.C., 318 F.2d 276 (D.C. Ct. App. 1963).

The order of the Commission will be affirmed.

FREEDMAN, *Circuit Judge,* concurring.

I concur in the affirmance of the order of the Commission. The dissent by Judge Washington in *Borrow v. Federal Communications Commission,* 285 F.2d 666 (D.C. Cir. 1960), cert. denied, 366 U.S. 904, is a powerful one, but until the Supreme Court indicates that the majority opinion in that case which has since been followed consistently in the District of Columbia Circuit is erroneous, I believe that our Circuit should follow it.

SEITZ, *Circuit Judge,* dissenting.

I would reverse for the reasons given in Judge Washington's dissenting opinion in Borrow v. F. C. C., 285 F.2d 666 (D. C. Ct. App. 1960); cert. denied 366 U. S. 904; and compare Schneider v. Smith, U. S. , 36 L. W. p. 4131 (Jan. 16, 1968).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 16,527

RALPH ILOWHITE,

Petitioner

vs.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION,

Respondents

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Present: McLaughlin, Freedman and Seitz, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of February 9, 1967 of the Federal Communications Commission in this case be, and the same is hereby affirmed.

Attest:

THOMAS F. QUINN
Clerk

March 5, 1968

Order of the Federal Communications Commission

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
	)
RALPH ILOWITE	)
425 Stevens Avenue	)
Ridgewood, New Jersey	)
	)
Applications for a General	)
Class Amateur Operator and	)
Station License and a Citizens	)
Radio Service Class D license	)

ORDER

The Commission has under consideration applications for a general class amateur operator and station license and a citizens radio service class D license filed by Ralph Ilowite, 425 Stevens Avenue, Ridgewood, New Jersey.

The Commission by letter dated October 13, 1966, requested Ralph Ilowite to answer and submit to the Commission, within 30 days of receipt, the questionnaire which was enclosed. He was informed that in the event he failed to file the information requested, his applications would be dismissed pursuant to Section 1.961(b) of the Commission's Rules.

By letter dated November 9, 1966, Attorney Victor Rabinowitz wrote to the Commission stating that he represented Ralph Ilowite. Under a delegation from his client, Victor Rabinowitz stated, "I am authorized on behalf of Mr. Ilowite to advise you

that he declines to answer the questionnaire because he feels that the Commission does not have legal authority to require those answers as a condition for the renewal of his amateur license and the granting of a Class D license."

The Commission by letter dated November 28, 1966, addressed to Victor Rabinowitz, Esquire c/o Rabinowitz & Boudin, Attorneys at Law, 30 East 42nd Street, New York, New York 10017, cited the Commission's statutory authority and supporting judicial decisions and opinions which clearly set forth the Commission's authority. Mr. Rabinowitz was informed that his client would be given an additional 30 days in which to answer the questionnaire; he was also informed that if the information was not received that his client's applications would be dismissed.

Neither Ralph Ilowite nor his attorney Victor Rabinowitz has supplied the requested information.

IT IS ORDERED, This 9th day of February 1967, that the applications of Ralph Ilowite are dismissed, without prejudice, under authority contained in Sections 303(1), 308(b), and 309(a) of the Communications Act of 1934, as amended, and Sections 0.332(h) and 1.961(b) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

No. 268

In the Supreme Court of the United States

October Term, 1968

RALPH LOWTER, PETITIONER

v.

UNITED STATES OF AMERICA

MEMORANDUM SUGGESTING MOOTNESS

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 263

RALPH ILOWITE, PETITIONER

v.

UNITED STATES OF AMERICA

MEMORANDUM SUGGESTING MOOTNESS

The petition for a writ of certiorari in this case, filed on July 3, 1968, seeks review of the judgment of the court of appeals affirming the Commission's dismissal without prejudice of petitioner's applications for amateur and citizen's radio licenses. The dismissal of the applications was based on petitioner's refusal to answer the Commission's inquiry as to whether he was or had ever been a member of the Communist Party or of any organization or group which advocates or teaches the overthrow of the government of the United States, or of any political subdivision thereof, by force or violence.

On August 22, 1968, the Commission, on further consideration, granted petitioner's applications for amateur and citizen's radio licenses, pursuant to a newly adopted policy whereby the Commission will no longer require applicants in the non-commercial

services to answer inquiries of the type involved in this case. Both the immediate case and the underlying issues have thus become moot. Accordingly, the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to that court with instructions that it be dismissed as moot. See, *e.g.*, *Weiss* v. *Gardner*, 386 U.S. 9; *Platt* v. *Minnesota Mining Co.*, 382 U.S. 456; *United States* v. *Leiter Minerals, Inc.*, 381 U.S. 413; *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY GELLER,
General Counsel,
Federal Communications Commission.

AUGUST 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968

SUPREME COURT, U. S.

SEP 10 1968

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1968

No. 263

RALPH ILOWITE,

Petitioner,

against

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

MEMORANDUM OPPOSING SUGGESTION OF MOOTNESS

Rabinowitz, Boudin & Standard
Attorneys for Petitioner
30 East 42nd Street
New York, N.Y. 10017

Victor Rabinowitz
David Rosenberg
of Counsel

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 263

RALPH ILOWITE,

Petitioner,

against

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

MEMORANDUM OPPOSING SUGGESTION OF MOOTNESS

Statement

This memorandum is submitted in opposition to the respondent's memorandum suggesting that this case has been mooted by the Commission's decision to grant petitioner's radio license applications pursuant to "a newly adopted policy whereby the Commission will no longer require applicants in the non-commercial services to answer inquiries of the type involved in this case." (Res. Mem. pp. 1-2).

Argument

The Commission's sudden change of its longstanding policy, scrupulously limited and obviously made in response to the present petition, does not adequately resolve the petitioner's claims nor does it reach the underlying issues; in short, a continuing controversy exists.

The jurisdiction of this Court is not divested by the mere cessation of the challenged conduct where the Commission "is free to return to [its] old ways." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632; *United States* v. *Trans-Missouri Freight Ass'n.*, 166 U.S. 290; *Walling* v. *Helmerich & Payne*, 323 U.S. 37. Respondents have failed to demonstrate "that 'there is no reasonable expectation that the wrong will be repeated.'" *United States* v. *W. T. Grant Co., supra,* at 633. There is no assurance at all that the Commission will not revive its "deeply rooted and long-standing" policy* tomorrow with respect to other applicants and even with respect to petitioner when he seeks to renew his licenses. See *Gray* v. *Sanders*, 372 U.S. 368, 376. The Commission neither disclaims the existence nor the validity of the statutory power underlying the policy which it has heretofore followed. On the contrary, the Commission affirms that power in its very concession to the petitioner by stating merely that it will not, at this time, apply its policy to applications for the type of license involved in this case. The temporary discontinuance of the political interrogation of "non-commercial" license applicants—a distinction whose rationale is not immediately apparent—not only poses a present threat to the rights of other classes of applicants but also to the security of petitioner's licenses.

In challenging the existence and constitutional validity of the Commission's policy of political interrogation, the petitioner

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* The Commission has interrogated applicants for initial and renewal licenses about Communist Party membership or associations for many years. The history of this practice is discussed fully in Emerson, Haber and Dorsen, *Political and Civil Rights in the United States*, 309-313 (1967). Reported challenges to this policy include *Matter of Lafferty*, 23 F.C.C. 761 (1957); *Matter of Pacifica Foundation*, 36 F.C.C. 147 (1964); *In re Application of Dispatch, Inc.*, 22 F.C.C. 1369 (1957); *Borrow* v. *Federal Communications Commission*, 285 F. 2d 666 (D.C. Cir. 1960), *cert. denied* 364 U.S. 892; *Cronan* v. *Federal Communications Commission*, 285 F. 2d 288 (D.C. Cir. 1960) *cert. denied* 366 U.S. 904; *Blumenthal* v. *Federal Communications Commission*, 318 F. 2d 276 (D.C. Cir. 1963).

represents the overriding public interest in preserving the separation of the exercise of legislative and executive powers and in protecting First and Fifth Amendment rights of radio license applicants. See *Greene* v. *McElroy*, 360 U.S. 474, 507; *Shelton* v. *Tucker*, 364 U.S. 479; *Schneider* v. *Smith*, 390 U.S. 17. This public interest is not extinguished by the Commission's new policy, see *Southern P.T. Co.* v. *Interstate Commerce Commission*, 219 U.S. 498; *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 304, and can be and is adequately represented by the petitioner. See *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 459. If this court reviews the merits it will have the advantage of a record which reflects full briefing, argumentation and consideration in the court below and which is supplemented by the extensive proceedings in identical, prior cases, *Blumenthal* v. *Federal Communications Commission*, 318 F. 2d 276 (D.C. Cir. 1963); *Borrow* v. *Federal Communications Commission*, 285 F. 2d 666 (D.C. Cir. 1960) *cert. denied* 364 U.S. 892; *Cronan* v. *Federal Communications Commission*, 285 F. 2d 288 (D.C. Cir. 1960) *cert. denied*, 366 U.S. 904.

The respondent does not even offer an adequate procedure for dismissal. While the *res judicata* effect of the decision below will be eliminated if the case is ordered dismissed under the respondents' suggested procedure, in reality the petitioner and other applicants will continue to face a formidable *stare decisis* barrier in any future case involving the issues presented here. This is precisely what happened below where the Third Circuit denied relief to the petitioner on the basis of the *Borrow, Cronan* and *Blumenthal* decisions in the Court of Appeals for the District of Columbia despite the doubts of a majority of the court. If this case is dismissed as moot, the issues now presented by the petitioner, which are admittedly substantial, will have to await settlement

until the petitioner or another applicant travels the long and expensive route to this Court.

CONCLUSION

The writ of certiorari should be granted and the case should be decided on its merits.

Respectfully submitted,

Rabinowitz, Boudin & Standard
Attorneys for Petitioner
30 East 42nd Street
New York, N.Y. 10017

Victor Rabinowitz
David Rosenberg
of Counsel

September 4, 1968

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

ILOWITE *v.* UNITED STATES ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 263. Decided October 14, 1968.

PER CURIAM.

Upon consideration of the suggestion of mootness and an examination of the entire record, the petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the Court of Appeals with directions to dismiss the case as moot.